93-426

No. 93-

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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PACIFIC LIGHTING CORPORATION, FREDRICKS DEVELOPMENT CORPORATION AND DUNN PROPERTIES CORPORATION,

*Petitioners,*

v.

MGW, INC.,

*Respondent.*

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**On Petition For Writ Of Certiorari To The California Court of Appeal, Fourth Appellate District**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the California punitive damage system and the $2,000,000 punitive damage award that it produced in this case against petitioners for failure to perform a legally unenforceable contract violate the Due Process Clause of the Fourteenth Amendment.

## LIST OF PARTIES

In addition to parties named in the caption, defendants Pacific Lighting Real Estate Group, formerly "Pacific Real Estate Projects, Inc." ("PREP"), Home Capital Corporation and Humboldt Financial Services Corporation were parties in the court below. Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies and non-wholly owned subsidiaries of petitioners:

Pacific Enterprises Corporation ("Pacific Enterprises"), formerly "Pacific Lighting Corporation," was the parent corporation of Fredricks Development Corporation ("Fredricks"), Dunn Properties Corporation ("Dunn"), and PREP, until 1987, when Fredricks, Dunn, and another Pacific Lighting Corporation subsidiary (The Presley Companies) were sold and reorganized. Dunn is now known as D Properties Corporation, a subsidiary of L. H. Pacific Corporation.

Pacific Enterprises presently owns approximately 96% of Southern California Gas Company, which in turn owns 4% of the Coalition Undertaking Remedial Efforts, Inc. Pacific Enterprises also owns 87.5% of FTM Sports Corporation ("FTM"), and FTM owns Cactus Golf, Inc.

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IN THE

# Supreme Court of the United States

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PACIFIC LIGHTING CORPORATION, FREDRICKS DEVELOPMENT CORPORATION AND DUNN PROPERTIES CORPORATION,
*Petitioners,*

v.

MGW, INC.,
*Respondent.*

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**On Petition For
Writ Of Certiorari To The
California Court of Appeal,
Fourth Appellate District**

---

## PETITION FOR WRIT OF CERTIORARI

---

Pacific Lighting Corporation ("Pacific Lighting"), Fredricks Development Corporation ("Fredricks") and Dunn Properties Corporation ("Dunn") hereby petition this Court for a writ of certiorari to review the judgment in this case of the California Court of Appeal, Fourth Appellate District.

### OPINIONS AND ORDERS BELOW

The July 15, 1993 order of the Supreme Court of California dismissing this case as improvidently

granted is unreported and reproduced in Appendix ("App.") A, *infra*, 1a. That Court's July 9, 1992 order granting review is reported at 2 Cal. 4th No. 21 at 1 and reproduced in App. B, *infra*, 2a-3a.

The April 2, 1992 opinion of the California Court of Appeal is partially reported at 12 Cal. App. 4th 244 and reproduced in its entirety in App. C, *infra*, 4a-33a. The March 18, 1991 order of this Court granting certiorari, vacating the initial judgment of the Court of Appeal in this case and remanding the case for further consideration in light of *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), is reported at 111 S. Ct. 1299 and reproduced in App. D, *infra*, 34a.

## JURISDICTION

The April 2, 1992 decision of California Court of Appeal expressly rejected petitioners' federal constitutional challenges to the $2,000,000 punitive damage award in this case. That decision is final. The Supreme Court of California issued its order reversing its previous order and dismissing this case as improvidently granted on July 15, 1993. This petition is being filed within ninety days of that order. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in pertinent part:

> [N]or shall any state deprive any person of . . . property, without due process of law. . . ."

U.S. Const. amend. XIV, § 1.

## STATEMENT OF THE CASE

This case involves a $2,000,000 aggregate punitive damage award imposed by a jury against Pacific Lighting and its two wholly owned subsidiaries Fredricks and Dunn for "tortious interference with prospective economic advantage" and conspiracy in connection with Fredricks' alleged breach of an oral real estate broker's contract that was rendered unenforceable by the California statute of frauds. *See* App. 6a-8a.

On March 18, 1991, this Court granted certiorari, vacated the Court of Appeal's initial judgment in this case and remanded for further consideration of the constitutionality of the punitive damage award in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). *See* App. 34a. On April 2, 1992, the court below issued its opinion on remand, holding that the California punitive damage system and the $2,000,000 award comported with the Due Process Clause of the Fourteenth Amendment as interpreted in *Haslip*. The court asserted that in California, the "jury's discretion [as to punitive damages] is guided by objective factors," App. 18a, and explicitly rejected petitioners' argument that the jury instructions were standardless and that "it was improper for the jury to consider the defendants' wealth in determining the amount" of the punishment, App. 20a-21a. The court also held that the standards and procedures for post-verdict judicial review, including California's "passion or prejudice" standard of appellate review, sufficiently constrained the jury's discretion. *Id.* at 19a-20a. Finally, the court held that the $2,000,000 punitive damage was not so arbitrary, unreasonable or

excessive as to violate the Due Process Clause. App. 22a-30a.

On July 9, 1992, the California Supreme Court granted review to decide whether the $2,000,000 punitive damage award is "consistent with federal constitutional due process as set forth in [*Haslip*]." App. 2a. However, immediately following this Court's November 30, 1992 grant of review in *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the California Supreme Court suspended briefing in this case.[1] *See* App. 35a. And less than three weeks after this Court's decision in *TXO*, the California Supreme Court dismissed this case—and three others raising similar federal due process issues[2]—as "improvidently granted." App. 1a.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari, vacate the judgment below and remand this case for further consideration in light of *TXO* for two reasons.

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[1] The court issued its order suspending the briefing schedule after petitioners had filed their opening briefs on the merits, MGW had filed its response on the merits and the California Supreme Court had on its own motion established a schedule for the remainder of the case regarding petitioners' reply brief, amicus briefs and the parties' responses to amicus briefs.

[2] *Gourley* v. *State Farm Mut. Auto. Ins. Co.*, 227 Cal. App. 3d 1099, 265 Cal. Rptr. 634 (1992), *review granted*, 2 Cal. 4th No. 21 at 1 (1992), *review dismissed*, 93 Daily Journal D.A.R. 9131 (Cal. July 15, 1993); *Wollersheim* v. *Church of Scientology*, 10 Cal. App. 4th 370 (1992), *review granted*, 832 P.2d 898, 10 Cal. Rptr. 2d 182 (Cal. 1992), *review dismissed*, 1993 Cal. LEXIS 3749 (Cal. July 15, 1993); *Hilgedick* v. *Koehring Fin. Corp.*, 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76 (1992), *review granted*, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (Cal. 1992), *review dismissed*, 1993 Cal. LEXIS 3748 (Cal. July 15, 1993).

First, it is necessary for this Court to send a clear and immediate signal that state courts that have not reformed their punitive damage systems to conform to the due process principles articulated in *Haslip* remain constitutionally obligated to do so.[3] Absent such action, any possibility that the lower courts might re-examine and rectify the defects in their respective systems without future plenary intervention by this Court will most certainly be eliminated.

This case is a perfect example. Two years ago this Court granted certiorari and remanded this case so that the California courts could determine whether the punitive damage system of the Nation's largest State satisfies the *Haslip* due process standards. While the court below and several other California Courts of Appeal had upheld the system as constitutional, the California Supreme Court interpreted *Haslip* to be a "constitutional mandate for meaningful

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[3] After the trial but prior to its decision in *TXO*, the West Virginia Supreme Court of Appeals had "demonstrated concern for the due process implications of punitive damages" and had attempted to reform its system to comply with *Haslip*. *See TXO*, 113 S. Ct. at 2741 (O'Connor, J., dissenting). In *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), the court required that juries be instructed on numerous, specific and detailed factors relating to the calculation of the amount of the punitive damage award, 413 S.E.2d at 908-09; eliminated the exceedingly deferential "passion or prejudice" judicial review standard, *id.* at 908; mandated that trial courts conduct extensive, on-the-record review of jury verdicts, *id.* at 909-10; and adopted the multiple, objective appellate-review factors approved in *Haslip*, *id.* at 910. In upholding the judgment in *TXO*, the plurality concluded that the West Virginia Supreme Court of Appeals had given "careful attention to the relevant precedents, including our decision in *Haslip* and their own prior decision in *Garnes*." *TXO*, 113 S. Ct. at 2724.

judicial scrutiny of punitive damages awards," *Adams* v. *Murakami*, 54 Cal. 3d 105, 118, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991), that cast serious doubt on California's punitive damage procedures. *See, e.g., id.* at 118 n.9 ("The California standard of review appears to be similar to those as to which the high court noted its concern [in *Haslip*]."). It therefore granted review in this case.

In the wake of *TXO*, however, the California Supreme Court cleared its docket of punitive damage cases, apparently perceiving *TXO* as blanket approval of punitive damages, or, at the least, a retraction of the "constitutional mandate" it had discerned from *Haslip*.[4] Thus, the mixed message of *TXO*[5] has short-

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[4] The California Supreme Court dismissed its punitive damage cases even though this Court on June 28, 1993, remanded a Kentucky case for additional scrutiny under *TXO* that had upheld a punitive damage award under *Haslip*. *See Hanson* v. *American Nat'l Bank & Trust Co.*, 844 S.W.2d 408 (Ky. 1992), *g.v.r.*, 113 S. Ct. 3029 (1993).

[5] While upholding a $10,000,000 punitive damage award in *TXO*, the plurality opinion by Justice Stevens announcing the Court's decision explicitly and repeatedly reaffirmed the constitutional principles that the Court announced in *Haslip*. *See, e.g.*, 113 S. Ct. 2720, 2724 (opinion of Stevens, J., joined by Rehnquist, C.J., and Blackmun, J., and in part by Kennedy, J.). Justice Kennedy added that "[w]hen a punitive damages award reflects bias, passion, or prejudice by the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award." *Id.* at 2714 (Kennedy, J., concurring in part and concurring in the judgment). Justice Scalia expressed the view that punitive damages are insulated from due process scrutiny unless "[t]raditional American practice governing [their] imposition" was not followed. *Id.* at 2726 (Scalia, J., concurring in the judgment, joined by Thomas, J.). And in her dissenting opin-

circuited precisely the kind of lower court constitutional analysis of punitive damages that this Court explicitly encouraged in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 79-80 (1988), and seemed implicitly to endorse in *Haslip*.

Second, the Court of Appeal expressly decided the jury instruction question that this Court discussed but ultimately left open in *TXO*.[6] Petitioners argued in the court below that the standardless, wealth-based California model jury instruction given in this case violated due process, particularly in light of the Court's statements in *Haslip* suggesting that such instructions might raise constitutional problems. *See* 111 S. Ct. at 1044-45. The Court of Appeal rejected that argument, finding that *Haslip* "merely required that the jury 'be guided *more* than the defendant's net worth.'" App. 22a (quoting *Haslip*, 111 S. Ct. at 1045) (emphasis added by court below).

In *TXO*, however, the Court again expressed concern about punitive damage jury instructions that "authorize[] the jury to take account of 'the wealth of the perpetrator.'" 113 S. Ct. at 2723 (opinion of Stevens, J.). The plurality opinion explicitly noted that, unlike the jury instruction "found adequate in *Haslip*," the *TXO* instruction permitted the jury to

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ion, Justice O'Connor observed that "neither [the *TXO*] award's size nor the procedures that produced it are consistent with the principles this Court articulated in *Haslip*." *Id.* at 2728 (O'Connor, J., joined by White and Souter, JJ.).

[6] "Because TXO's constitutional attack on the jury instructions was not properly presented to the highest court of the State," the Court declined to pass on the question whether the instructions comported with due process. *TXO*, 113 S. Ct. at 2723-24 (citation omitted).

consider the defendant's wealth, and it found this difference "significant." *Id.* Even though the instruction at issue was relatively detailed, *see id.* at 2723 n.29, the Court "agree[d] with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations . . . ." *Id.* at 2723. Justices Kennedy and O'Connor made the same point. *See id.* at 2738, 2739 (O'Connor, J., dissenting) (discussing the "special danger of bias" created by wealth evidence and concluding that "the jury was influenced unduly by TXO's out-of-state status and its large resources" in violation of due process); *id.* at 2725-26 (Kennedy, J., concurring) ("On its facts, this case is close and difficult; Justice O'CONNOR makes a plausible argument, based on the record and the trial court's instructions, that the size of the punitive award is explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant.").

Accordingly, the various opinions in *TXO* directly undermine the California Court of Appeal's holding below rejecting petitioners' due process challenge to the punitive damage jury instruction given in this case, making reconsideration by that court necessary and appropriate.

## CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and remand this case for further due process scrutiny of the $2,000,000 punitive damage award.

September 16, 1993

Respectfully submitted,

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*Attorneys for Petitioners*

**Counsel of Record*

# APPENDIX

## APPENDIX A

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

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**No. 4/3 G006654 - S015966**

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MGW, INC.,

Appellant

v.

FREDERICKS DEVELOPMENT CORPORATION et al.,

Appellants

---

**[Filed July 15, 1993]**

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Pursuant to Rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division Three.

Lucas
Chief Justice

Mosk
Associate Justice

Panelli
Associate Justice

Kennard
Associate Justice

Arabian
Associate Justice

Baxter
Associate Justice

George
Associate Justice

## APPENDIX B

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

MGW INCORPORATED,

Appellant

v.

FREDERICKS DEVELOPMENT CORPORATION et al.,

Appellants

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## ORDER GRANTING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

**Fourth Appellate District, Division Three, No. G006654-S015966**

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**[Filed July 9, 1992]**

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Petitions for review GRANTED.

Pursuant to rule 29.2(a) of the California Rules of Court, review is limited to the issues of: (1) whether the punitive damages awards are consistent with federal constitutional due process as set forth in Pacific Mutual Life Insurance Co. v. Haslip (1991) 499 U.S. ___ [113 L.Ed.2d 1; 111 S. Ct. 1032]; and (2) whether the amounts of the punitive damages awards are excessive under California law.

The court denies review of issues two and three enumerated in the petition for review (page 2) of Pacific Lighting Corporation. The court denies review of issues one and two enumerated in the petition for review (page 1) of

Fredericks Development Corporation and Dunn Properties Corporation.

Lucas
Chief Justice

Panelli
Associate Justice

Arabian
Associate Justice

Baxter
Associate Justice

George
Associate Justice

_____
Associate Justice

_____
Associate Justice

_____
Associate Justice

## APPENDIX C

## CERTIFIED FOR PARTIAL PUBLICATION[1]

## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## FOURTH APPELLATE DISTRICT

## DIVISION THREE

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**G006654**
**(Super. Ct. No. 416196)**

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MGW, INC.,
Plaintiff and Appellant,

v.

FREDRICKS DEVELOPMENT CORPORATION et al.,
Defendants and Appellants.

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**[Filed April 2, 1992]**

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## O P I N I O N

APPEAL from a judgment of the Superior Court of Orange County, Samuel B. Taylor, Jr., Judge. Affirmed in part and reversed in part.

Perez, McNabb & Cook, Perez & McNabb, Richard L. Perez, Sandra J. McNabb and Jeffrey Alan Miller for Plaintiff and Appellant.

Irell & Manella, Scott D. Baskin, Andra Barmash Greene, Harry P. Weitzel, Gibson, Dunn & Crutcher, John

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[1] Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II and III.

A. Arguelles, John J. Swenson, Robert F. Serio, Theodore J. Boutrous, Kimberly D. Reed, Higgs, Fletcher & Mack, John M. Morris, Merville Thompson, Woodrow D. Smith, Melvin King, Drummy, Garrett, King & Harrison, Howard F. Harrison and Kathleen Carothers Paone for Defendants and Appellants.

Fredricks Development Corporation, Dunn Properties Corporation and Pacific Real Estate Projects, Inc. (PREP) appealed from a judgment awarding real estate broker MGW, Inc. general and punitive damages for interference with prospective economic advantage and conspiracy based upon Fredricks' refusal to pay MGW a commission pursuant to an oral broker's agreement. MGW appealed from orders of nonsuit in favor of defendants Home Capital Corporation and Humboldt Financial Services Corporation, and an order granting judgment notwithstanding the verdict and a new trial in favor of defendant Pacific Lighting Corporation. We reversed the orders granting judgment notwithstanding the verdict and a new trial as to Pacific Lighting and affirmed in all other respects. (*MGW Inc.* v. *Fredricks Development Corporation et al.* (Apr. 30, 1990) G006654.) The California Supreme Court denied review, but the United States Supreme Court granted certiorari and ordered this court's judgment vacated and remanded "for further consideration in light of *Pacific Mutual Life Insurance Company* v. *Haslip*, 499 U.S. ___ (1991)." We affirm in part and reverse in part.[2]

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[2] Because the order on writ of certiorari only refers to *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. ___ [113 L.Ed.2d 11], dealing with the constitutionality of punitive damages, our "resolution of the other issues stands as between the parties.' (Advisory Com. to Cal. Rules of Court, rule 29.2.)" (*People* v. *Alfaro* (1986) 42 Cal.3d 627, 637, fn. 9; see also *Agricultural Labor Relations Bd.* v. *Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709, fn. 12.) Those other issues had been fully briefed and argued by the parties. Because the order vacated the prior judgment of this court, we reiterate our prior resolution of those issues (with minor textual changes) in parts I, II, and III of this opinion. The constitutional issue is discussed in part IV.

* * *

Plaintiff MGW is a commercial real estate brokerage and investment firm owned and operated by Malcolm Waitt, Jr., a licensed real estate broker. Waitt is MGW's only employee.

Defendant Fredricks Development Corporation is a real estate developer involved in the construction of large-scale residential tracts. Fredricks is a wholly-owned subsidiary of Pacific Lighting Corporation.

In 1982 Fredricks made known to Waitt and other local brokers that it was interested in acquiring a large residential project along the I-15 corridor in the southern Orange County or northern San Diego County area. Waitt was told that if he brought in an opportunity Fredricks undertook and was not paid a broker's fee by the seller, Fredricks would see he was fairly compensated. This was Fredricks' standard arrangement, and on at least one previous occasion Waitt was paid for his efforts under this arrangement. Waitt had no written broker's contract with Fredricks.

On February 14, 1983, Waitt read a newspaper article saying Home Capital, which was in the business of financing developments, had bought out its partner and was looking for an experienced developer and joint venturer to help build out a 1500-acre mixed residential/commercial project known as Rancho Carmel.[3] The project was located along the I-15 corridor in northern San Diego County. Waitt, believing this was just the opportunity Fredricks was looking for, called Home Capital and told them Fredricks might be interested in the project. Home Capital told Waitt that if they struck a deal with Fredricks they would not pay a broker's fee and he would have to look to Fredricks for any commission.

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[3] Humboldt Financial Services Corporation also owned a small part of the project.

Waitt showed the article to Fredricks. Fredricks told him that neither it nor Pacific Lighting was aware of the Rancho Carmel opportunity, and on being advised Home Capital would not pay a broker's commission, Fredricks assured Waitt that if it went ahead with the deal he would be fairly compensated. Dunn Properties Corporation, another wholly-owned subsidiary of Pacific Lighting which builds out commercial tracts, became involved because Fredricks could not handle the commercial end of the project.

On March 21, 1983, Fredricks, Home Capital and Dunn signed a letter of intent to enter into a joint venture to build the Rancho Carmel project. The purpose of the letter was to tie up the property for a period of time in order to allow Fredricks and Dunn to determine the project's feasibility. One of its provisions was: "[Dunn and Fredricks] and Home [Capital] each hereby represent to one another that no broker or finders fee will be payable as a result of D & F and Home entering into the proposed venture and each indemnifies the other against any such broker or finders fee."

Waitt frequently asked about the project and was led to believe the deal was progressing smoothly and that Fredricks intended to compensate him. He was never told he would not be paid a commission.

The joint venture interest was ultimately purchased on behalf of Fredricks and Dunn in the name of PREP, which was a wholly-owned subsidiary of Pacific Lighting. Fredricks, however, refused to pay Waitt a broker's commission, claiming the Pacific Lighting corporations knew of the opportunity before Waitt brought the newspaper clipping to them. Waitt was told that in late 1982 there had been rumors the Rancho Carmel project might soon become available, that Dunn had inquired (through a different broker) whether Home Capital would sell off just the commercial use, that Home Capital said it was unwilling

to discuss sale of the project until it bought out its joint venturer, and that Home Capital was unwilling to sell off just the commercial part of the project since it viewed the entire development as an integrated plan. Dunn, however, did not pursue the commercial part of the project at any time after it became available and before Waitt brought Fredricks the article.

Waitt filed an action for breach of oral agreement, quantum meruit, tortious breach of the covenant of good faith and fair dealing, conspiracy and tortious interference with prospective economic advantage. The complaint named Fredricks, Dunn, Pacific Lighting, PREP, Home Capital and Humboldt as defendants.

At trial the court dismissed all of MGW's contractual claims on the ground they were unenforceable under the statute of frauds. A nonsuit was granted in favor of Home Capital and Humboldt, and a nonsuit was granted to PREP on the interference with prospective advantage claim. The jury returned a verdict of $558,000 in damages against Fredricks, Pacific Lighting, Dunn and PREP, and $2 million in punitive damages against all defendants but PREP. Pacific Lighting's motions for judgment notwithstanding the verdict and a new trial were granted. Fredricks, Dunn and PREP appeal from the judgment. MGW appeals from the orders of nonsuit, new trial, and judgment notwithstanding the verdict.

I

Fredricks and Dunn argue that no cause of action can be stated for interference with prospective economic advantage when the underlying agreement violates public policy. While recognizing that *Buckaloo* v. *Johnson* (1975) 14 Cal.3d 815 holds that a broker may state a cause of action for interference with prospective economic advantage even when the agreement violates the statute of frauds (*id.* at pp. 829-830), Fredricks and Dunn argue the

Supreme Court has signalled a change in this rule in its opinion in *Phillippe* v. *Shapell Industries* (1987) 43 Cal. 3d 1247. We disagree.[4]

In *Buckaloo* the court held a purchaser may not, "with full knowledge of the economic relationship between broker and seller, intentionally induce[] the latter to violate the terms of the relationship and seek refuge in the unenforceability of the contract." (*Buckaloo* v. *Johnson*, *supra*, 14 Cal.3d at p. 827.) The court explained: "There is no public policy to be served by encouraging such devious dealings; on the contrary, such an intrusion into a protected economic relationship is precisely the conduct condemned by the traditional tort of interference with contract." (*Id.* at p. 828.) In *Phillippe* the court reemphasized its commitment to the principle that a contractual claim for a real estate commission is dependent on compliance with the statute of frauds (*Phillippe v. Shapell Industries*, *supra*, 43 Cal.3d at p. 1267), and held a broker may not avoid the statute of frauds by asserting that he reasonably relied on an oral agreement. (*Id.* at p. 1270.) Nothing in *Phillippe* suggests that *Buckaloo* has been overruled; indeed, it cites *Buckaloo* approvingly.

Fredricks and Dunn contend the judgment must be reversed because Dunn, as an agent and wholly-owned subsidiary of Pacific Lighting, could not interfere with the relationship, there was no evidence Fredricks refused to pay the commission because of what Dunn told it, and there could be no conspiracy because there was no underlying tort. We disagree.

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[4] The five elements for interference with prospective economic advantage are: "(l) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. [Citations.]" (*Youst* v. *Longo* (1987) 43 Cal.3d 64, 71, fn. 6.)

Although the arguments appear to raise issues of law, on closer review it is clear they are based on the notion that there is no substantial evidence to support the jury's finding Dunn conspired or could conspire with Fredricks. In reviewing a claim of insufficiency of the evidence we "must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is . . . to be resolved in favor of the finding.' [Citation.]" (*County of Mariposa* v. *Yosemite West Associates* (1988) 202 Cal. App.3d 791, 807; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 282, p. 293.)

Fredricks and Dunn initially assert Dunn could not interfere with MGW's prospective economic relationship because it was not a malicious interloper or stranger to the disrupted relationship. Relying on selected language in *Buckaloo* v. *Johnson*, *supra*, 14 Cal.3d at page 827 and *Zimmerman* v. *Bank of America* (1961) 191 Cal.App.2d 55, 61, they contend Dunn, as a wholly-owned subsidiary of Pacific Lighting, could not interfere with a relationship to which it was a party. The argument is subtly deceptive. Although Fredricks and Dunn are subsidiaries of Pacific Lighting, that does not mean they are "the same party" and cannot interfere with the other's economic relationships. Indeed, evidence adduced at trial was that the two subsidiaries worked independently in different parts of the development world: Fredricks was involved in the residential arena while Dunn was involved in the commercial; the two were competitors and had never, until Rancho Carmel, worked on a project together; and Pacific Lighting does not guarantee the obligations of its subsidiaries. From this evidence the jury could reasonably conclude Fredricks and Dunn were independent entities.

In that same vein, Fredricks and Dunn argue Dunn could not interfere because it was Fredricks' agent. While

the complaint alleged the defendants were agents of each other, the evidence was to the contrary. Moreover, MGW's motion to amend the complaint to conform to proof and delete the allegations of agency was properly granted. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1137, pp. 551-552.)

Fredricks and Dunn urge MGW disproved causation by showing Fredricks decided not to pay the commission for reasons other than what Dunn said. But the jury concluded that it was precisely because of what Dunn said that the commission was not paid. There may be evidence which could be interpreted differently, but we must resolve all conflicts in the evidence in favor of the finding.

Fredricks and Dunn contend the trial court improperly instructed the jury by failing to define who constituted an employee or agent of a party, and improperly used the term "parties," rather than "interloper," when describing the one who interferes. This argument cannot be sustained as no request for a proper instruction was made below. (*Null* v. *City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.)

They assert the court improperly instructed the jury that, "a broker may have a reasonable expectation of compensation when he is the procuring cause of a buyer's purchase, even though the underlying oral agreement, if any, with the buyer is unenforceable. [¶] Now, it is for you the jury to determine the circumstances and whether or not the plaintiff's expectation was reasonable in the light of those circumstances." Under *Phillippe*, it is clear a broker cannot have a reasonable expectation of payment when the agreement is oral. (*Phillippe* v. *Shapell Industries*, *supra*, 43 Cal.3d at p. 1262.) But an element of the tort is the probability of future economic benefit. (*Buckaloo* v. *Johnson*, *supra*, 14 Cal. 3d at p. 827.) The instruction given was the trial court's effort to incorporate that element in its charge. Perhaps the wording could have been

better, but the instruction did not reduce plaintiff's burden nor unreasonably focus the jury's inquiry on the subjective intent of MGW. There was no error.

II

PREP was held liable on the theory it conspired to prevent MGW from receiving a broker's commission. It asserts the judgment must be reversed because Pacific Lighting cannot conspire with its wholly-owned subsidiaries, the judgment is not supported by substantial evidence, and MGW "has disproved interference." We disagree.

In support of its argument that a parent corporation cannot conspire with its wholly-owned subsidiaries, PREP relies on *Copperweld Corp.* v. *Independence Tube Corp.* (1984) 467 U.S. 752. In that case, the issue was whether the coordinated acts of a parent corporation and a wholly-owned subsidiary could constitute a "combination or conspiracy" under section 1 of the Sherman Antitrust Act. (*Id.* at p. 759.) In holding it could not, the United States Supreme Court noted, "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. . . . For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Id.* at p. 769; see also *Klein* v. *Oakland Raiders, Ltd.* (1989) 211 Cal.App.3d 67, 76.)

*Copperweld's* analysis, which is well suited to the antitrust field, is ill suited to the civil conspiracy arena where the focus is not on whether there is a "combination" of economic power, but on whether an individual has joined with another to perpetrate a civil wrong. No California case has applied *Copperweld* or its reasoning in this context (*MacManus* v. *A.E. Realty Partners* (1987) 195

Cal.App.3d 1106, 1110; see also *Pinhas* v. *Summit Health, Ltd.* (9th Cir. 1989) 894 F.2d 1024, 1033), and we are unwilling to do so when the evidence showed PREP was a separate entity wholly responsible for its own obligations. It purchased the project in its own name and assumed a large debt without a guarantee by its parent corporation. It participated, through its officers, in the decision not to pay MGW a commission. Under the facts adduced at trial, there is substantial evidence to support the judgment and to prove PREP interfered with MGW's economic relationship with Fredricks.

III

MGW asserts the trial court erred in granting Pacific Lighting's motion for judgment notwithstanding the verdict. We agree. "'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]" (*Hauter* v. *Zogarts* (1975) 14 Cal.3d 104, 110.)

Here, there was substantial evidence supporting the jury's conclusion Pacific Lighting interfered, or conspired to interfere, with MGW's prospective economic advantage. Jim Hunter testified he was an employee of Pacific Lighting and was responsible for supervising its real estate subsidiaries,including Fredricks and Dunn. He was chairman of the board of the subsidiaries and was responsible for overseeing their real estate activities and sales. Hunter was involved in the decision as to whether MGW should be paid and he counseled against paying a commission on the ground the Rancho Carmel project was previously known to the Pacific Lighting group. From this testimony, the jury could reasonably conclude that Pacific Lighting

participated in the decision to refuse to pay the real estate commission, and thus the motion for judgment notwithstanding the verdict should have been denied.

MGW also contends the trial court improperly granted Pacific Lighting's motion for new trial. Under Code of Civil Procedure section 657, an order granting a new trial "shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order . . . ." Although Pacific Lighting offers several reasons why the motion was properly granted, none have merit.

Pacific Lighting argues the court failed to properly instruct the jury as to the prerequisites for awarding punitive damages. But Pacific Lighting never asked for such instruction and thus any error on this point was waived. (*Null* v. *City of Los Angeles*, *supra*, 206 Cal.App.3d at p. 1535.) It asserts that, as a matter of law, a parent corporation cannot conspire with its wholly-owned subsidiaries. We have previously rejected that argument concerning the judgment against PREP. (*MacManus* v. *A.E. Realty Partners*, *supra*, 195 Cal.App.3d at p. 1110.) Pacific Lighting urges the judgment was not supported by the evidence. That argument is meritless because Hunter's testimony established that Pacific Lighting participated in the decision to refuse to pay MGW its commission. (See *Hauter* v. *Zogarts*, *supra*, 14 Cal.3d at p. 110.) It contends the jury failed to reach a consensus on the issue of damages in violation of the "nine-juror rule," but it fails to demonstrate that less than nine jurors made the required finding here. (*Juarez* v. *Superior Court* (1982) 31 Cal.3d 759, 766; *Earl* v. *Times-Mirror Co.* (1921) 185 Cal. 165, 182-186.)

Home Capital and Humboldt, sellers of the property, escaped liability when the trial court granted their motion for nonsuit. MGW argues the motion should not have been granted because the evidence demonstrated the sellers par-

ticipated in the conspiracy to interfere with payment of the commission. We disagree.

"A motion for nonsuit is tantamount to a demurrer to the evidence and presents a question of law: whether the evidence offered in support of the plaintiffs' case could justify a judgment in the plaintiffs' favor. [Citation.] In reviewing the propriety of the trial court's order granting the . . . motion . . . , we must accept plaintiffs' evidence as true . . . and resolve all conflicts and reasonable inferences in their favor. [Citations.]" (*Lussier* v. *San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 98.)

Waitt was told at the outset that Home Capital would not pay him a broker's fee on sale of the project and that he would have to look to the buyer for any commission. While Home Capital entered into a letter of intent with Fredricks which provided it would not pay any broker's commission, that was but a restatement of its consistent position that the buyer would be responsible for any commission. There was no evidence Home Capital signed the letter of intent to help Fredricks avoid paying a commission. Indeed, there was testimony Home Capital did not know Fredricks would refuse to pay a commission for locating the project. Since there was no evidence Home Capital and Humboldt conspired to interfere with MGW's prospective economic advantage, the motion was correctly granted.

The trial court granted judgment on the pleadings on the contract causes of action finding they were barred by the statute of frauds. (Civ. Code, § 1624.) MGW contends the statute of frauds does not apply because it was asked to locate a "business opportunity" and not real property. The contention is without merit.

A business opportunity is "the sale or lease of the business and goodwill of an existing business enterprise or opportunity." (Bus. & Prof. Code, § 10030.) However one may portray the "project" Fredricks was seeking when it

told Waitt and other local brokers it was interested in acquiring a large residential project, Fredricks was not seeking a "business opportunity" as that term is defined in the Business and Professions Code. Waitt was asked to locate real property on which Fredricks could build homes. Since the basic purpose of the agreement was to locate real estate, the statute of frauds was applicable and required the broker's agreement to be in writing. (See *Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1255; *Tenzer* v. *Superscope, Inc.* (1985) 39 Cal.3d 18, 25-27.) The trial court properly granted the motion for judgment on the pleadings as to the contract causes of action. (See *Beck* v. *American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1565.)

IV

*Pacific Mut. Life Ins. Co.* v. *Haslip, supra*, 499 U.S. ___ [113 L.Ed.2d 1] held, although the common-law method of assessing punitive damages is not so "inherently unfair as to deny due process . . . per se," their imposition in a particular case *can* violate the due process clause. (*Id.* at p. ___ [113 L.Ed.2d at pp. 19-20].) In concluding the punitive damages in *Haslip* were constitutionally permissible, the United States Supreme Court concentrated on three facets of the Alabama procedures involved: (1) instructions pointed the jury to the purposes of deterrence and retribution and directed it to consider the character and degree of the wrong and need to prevent similar wrongs; (2) there were established trial court post-trial review procedures, requiring the court to state reasons for affirming or setting aside an award after considering the defendant's culpability, the deterrent effect on others, and impact on innocent third parties; and (3) the state Supreme Court reviewed the award, making a comparative analysis of other awards and applying a detailed substantive analysis. (*Id.* at p. ___ [113 L.Ed.2d at pp. 20-22].)

The Supreme Court did *not* say these factors were sine qua nons of a constitutionally adequate system of punitive damages awards. The court first noted a history of nearly 150 years of affirming the propriety of punitive damages, concluding that "[i]n view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional. ' "If a thing has been practised [*sic*] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " [Citation.]" (*Id.* at p. ___ [113 L.Ed.2d at pp. 19-20].)

But the court acknowledged that there was a constitutional issue to be resolved: "It would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. . . . [¶] One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. [Citation.] We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." (*Id.* at p. ___ [113 L.Ed.2d at p. 20].)

From these statements we discern that the Supreme Court was attempting to strike a balance between the historical American reliance on the wisdom of the jury and the need to protect parties when the functioning of that process goes awry in rare instances. The Supreme Court's solution was to determine whether the Alabama system "impose[d] sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." (*Id.* at p. ___ [113 L.Ed.2d at p. 22].)

Our task is to determine whether California's system does the same. *Las Palmas Associates* v. *Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1256-1259 held that it does, and we agree. (See also *Wollersheim* v. *Church of Scientology of California* (Mar. 20, 1992, B023193) ___ Cal.App.4th ___, ___; *Liberty Transport, Inc.* v. *Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417, 441.)[5] The jury's discretion is guided by objective factors designed to effect the policies behind such awards (BAJI No. 14.71),[6] the trial court independently determines the propriety of the award (*Neal* v. *Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 933; *Ferraro* v. *Pacific Fin. Corp.* (1970) 8 Cal.App. 3d 339, 351), and the appellate courts use objective factors in their review (*Neal* v. *Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928).

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[5] *Liberty Transport* was disapproved in *Adams* v. *Murakami* (1991) 54 Cal.3d 105, 115-116 insofar as it held that proof of the defendant's financial condition was not a prerequisite to a valid award of punitive damages. However, the *Adams* court expressly declined to decide the constitutionality of California's punitive damages standard. (*Id.* at pp. 118-119, fn. 9.) And, although *Liberty Transport* was tried after the effective date of the 1987 amendments to Civil Code section 3294, the differences in the criteria applied are not sufficiently different to eschew *Liberty Transport* as persuasive authority.

[6] As read to the jury here, the instruction provided in relevant part: "In arriving at any award of punitive damages, you are to consider the following: [¶] 1. The reprehensibility of the conduct of the defendant; [¶] 2. The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; [¶] 3. That the punitive damages must bear a reasonable relation to the actual damages." The jury was also told punitive damages were for the purpose of punishment and could be awarded only by finding upon clear and convincing evidence that the defendants were guilty of fraud or malice, as specifically defined. These constraints parallel those found to be adequate in *Pacific Mut. Life Ins. Co. v. Haslip, supra*, 499 U.S. ___ [113 L.Ed.2d at pp. 20-21] and the objective factors used by California courts to review the propriety of punitive damages awards. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

The California Supreme Court recently commented briefly upon the potential impact of the *Haslip* decision on the adequacy of California's system of appellate review, pointing out that the Mississippi and Vermont standards of review criticized in *Haslip* "appear[] to be similar to" California's. (*Adams* v. *Murakami*, *supra*, 54 Cal.3d at p. 118, fn. 9.) To make this observation the *Adams* court referred to language in *Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at page 928 that in California "a punitive damages award will be set aside only when it 'is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice.' " (*Adams* v. *Murakami*, *supra*, 54 Cal.3d at p. 118, fn. 9.) However, because resolution of that issue was unnecessary, the Supreme Court did not decide it and refused to express an opinion on it. (*Id.* at pp. 118-119, fn. 9.)

Upon careful study we conclude the California standard of review is much more objective than is suggested by the language quoted above. After stating the standard of review in terms of "passion or prejudice," the *Neal* court immediately pointed out that "[i]n making the indicated assessment we are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages." (*Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928, fn. omitted.) The court listed three factors to be considered: (1) whether the amount of the award reasonably reflects the reprehensibility of the defendant's conduct; (2) whether the punitive damages bear a reasonable relationship to the actual damages; and (3) whether the award will have a deterrent effect without crippling the financial existence of the defendant. (*Ibid.*) Although not as numerous as the factors applied by Alabama appellate courts (see *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. ___ [113 L.Ed.2d at p. 22]),[7] they do encompass the same basic concepts. (See

[7] Those factors are: "(a) whether there is a reasonable relationship

*George* v. *International Society for Krishna Consciousness of California* (Jan. 30, 1992, D007153) 3 Cal.App.4th 52, 123, fn. 54.) The California standard is the objective type mandated by *Haslip*. (See *Glasscock* v. *Armstrong Cork Co.* (5th Cir. 1991) 946 F.2d 1085, 1098-1099 ["passion and prejudice" standard of review in Texas is constitutional because meaningful review factors are applied]; *Robertson Oil Company* v. *Phillips Petroleum Company* (W.D. Ark. 1991) 779 F.Supp. 994, 996 ["shocks the conscience" standard is constitutional because objective criteria are applied]; see also *Hospital Authority* v. *Jones* (Ga. 1991) 409 S.E.2d 501, 503 [Georgia punitive damages procedures are constitutional although providing less structured post-trial and appellate review than the Alabama system].)[8]

Pacific Lighting, Fredricks and Dunn assert several defects in the procedures used here.[9] They argue it was

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between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." (*Ibid.*)

[8] This conclusion is bolstered by the California requirement of clear and convincing evidence to support an award of punitive damages, a higher standard than the preponderance level approved in *Haslip*. *Liberty Transport, Inc.* v. *Harry W. Gorst Co.*, *supra*, 229 Cal.App.3d at p. 436; *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. at p. — [113 L.Ed.2d at p. 23, fn. 11]; see *Dunn* v. *Owens-Corning Fiberglass* (D.Virgin Islands 1991) 774 F.Supp. 929, 947 ["clear and convincing" standard provides safeguard not present in system approved in *Haslip*].)

[9] Although we might fairly read the United States Supreme Court's mandate in this case as requiring a consideration only in the abstract of the California punitive damages system ("this cause is remanded to

improper for the jury to consider the defendants' wealth in determining the amount that would adequately deter similar conduct, citing a comment in *Haslip* that Alabama law excluded such evidence. (*Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. at p. ___ [113 L.Ed.2d at p. 21.) But the Alabama system only prohibited evidence of wealth at the liability stage, allowing it to be presented to the trial court at the post-trial review of punitive damages. (See *Green Oil Co.* v. *Hornsby* (Ala. 1989) 539 So.2d 218, 222-224.) Presumably, the purpose is to avoid prejudicing the jury with evidence of the defendant's wealth before liability is determined. In California that goal is accomplished by delaying the determination of the amount of damages until after malice, oppression, or fraud is found. (Civ. Code, § 3295, subd. (d).)

The California Supreme Court held in *Adams* v. *Murakami*, *supra*, 54 Cal.3d 105 that proof of the defendant's financial condition is a *prerequisite* to a valid punitive damages award.[10] (*Id.* at pp. 115-116.) And the Supreme Court

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the Court of Appeal . . . for further consideration in light of [*Haslip*]"), we choose to consider the defendants' arguments that the proceedings here were constitutionally defective. Fredricks and Dunn argue that the Supreme Court's action precludes us from finding they waived the constitutional issue by failing to raise it before this court in the initial proceedings here. We are not so constrained. (See, e.g., *Colorado* v. *Connelly* (1986) 479 U.S. 157, 171, fn. 4 [on remand state court was free to consider any issue not inconsistent with Supreme Court opinion].) However, because it does not alter the result, and because the issue was raised at least perfunctorily in the trial court, we opt to give Dunn and Fredricks the full due process they seek and address the issues on the merits. (See *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 394 [appellate court has discretion to address fundamental constitutional error raised for the first time on appeal].)

[10] Compare the practice in Alabama, approved by the Supreme Court in *Haslip*, of not permitting evidence of net worth before the jury at any stage. It may only be considered during the post-trial review of the amount awarded. (*Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. ___ [113 L.Ed.2d 1.) However, our Supreme Court's decision in

in *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. ___ [113 L.Ed.2d l] merely required that the jury "be guided by *more* than the defendant's net worth." (*Id.* at p. ___ [113 L.Ed.2d at p. 22].) It did not prohibit such evidence. Here, evidence of wealth was admitted only to allow the jury to determine whether the award would have a deterrent but non-crippling effect on the defendants. (*Adams* v. *Murakami*, *supra*, 54 Cal.3d at pp. 115-116; *Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928.)

Pacific Lighting, Fredricks, and Dunn raise several claims directed at the trial court's review of the punitive damages award at the motion for new trial. To put the assertions in proper context, we look to the United States Supreme Court's observations about the Alabama system of trial court review in *Haslip*.

The high court observed, "[T]he Supreme Court of Alabama . . . established post-trial procedures for scrutinizing punitive awards . . . [stating] that trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' [Citation.] Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.' [Citation.] The . . . test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." (*Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. ___ [113 L.Ed.2d at p. 21].)

The Supreme Court did not say trial court review was a prerequisite to a valid award of punitive damages. In

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*Adams* to *require* evidence of net worth before the jury as a prerequisite to the award of punitive damages compels us to conclude this difference is of no constitutional significance.

fact it said that "[*t*]*he Alabama Supreme Court's post-verdict review* ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." (*Id.* at p. ___ [113 L.Ed.2d at p. 22], emphasis added.) Thus, appellate review serves virtually the same purpose as trial court review, lessening the importance of trial court review.[11]

Against this backdrop Pacific Lighting, Fredricks, and Dunn suggest the California trial court review system is inadequate. They point out that in Alabama the trial court is required to hold a hearing after trial where additional evidence may be introduced. (See, e.g., *Wilson* v. *Dukona Corp.* (1989) 547 So.2d 70, 73-74.) They contrast the California system where a new trial motion is heard only upon request and, unlike Alabama, the trial court need not state on the record its reasons for *denying* the motion.

The answer to the first complaint is simple. A defendant who is upset by a punitive damages award may have it reviewed in the trial court simply by moving for a new trial pursuant to Code of Civil Procedure section 657, hardly a constitutionally onerous task. Here, all of the defendants asked the trial court to review whether *any* punitive damages were merited. The court performed that review and denied the motion as to Fredricks and Dunn, but granted it as to Pacific Lighting on other grounds. We presume that had Fredricks and Dunn asked the trial court to review whether the damages were *excessive*, the court would have done so.

The defendants' second observation is correct; California only requires the trial court to set forth reasons for *granting* the motion. (Code Civ. Proc., § 657; *Neal* v. *Farmers*

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[11] We do not make these observations to suggest no trial court review is ever necessary, but to put it in its proper perspective in the scheme of post-verdict review.

*Ins. Exchange, supra*, 21 Cal.3d at p. 931.) But this fact does not reveal a constitutional defect in the procedure. The purposes of requiring the court to specify its reasons for granting the motion are to "encourage careful deliberation by the trial court before ruling on the new trial motion and to make a sufficiently precise record to permit meaningful appellate review." (*Stevens* v. *Parke, Davis & Co.* (1973) 9 Cal.3d 51, 61.) The former purpose is met even if the trial court ultimately denies the motion, and it is the only purpose relevant to the goal of "meaningful and adequate" *trial court review* noted by *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. at page ___ [113 L.Ed.2d at page 21].[12]

The defendants claim California trial courts have no duty to independently review the punitive damages at the motion for new trial and the system is thus constitutionally suspect. They seem to assume *Haslip* mandates such an independent review, but the *Haslip* opinion does not say that. And the Alabama system does not provide for a completely independent trial court review. There is a presumption the jury verdict was proper. (*Green Oil Co.* v. *Hornsby*, *supra*, 539 So.2d at pp. 222, 224.)

Even so, in California the trial court's determination is virtually independent. "In considering a motion for new trial, the trial judge is entitled to reweigh the evidence, consider the credibility of the witnesses and draw reasonable inferences contrary to those accepted by the jury. [Citation.] The question is not whether there is substantial evidence to support the jury's verdict but whether the

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[12] We have not found that the failure to require reasons for denying the motion hampers meaningful appellate review. However, it would be the better practice to state such reasons when denying the motion as to the amount of punitive damages. Because the trial court here was not asked to do so, we have no record, but for reasons to be stated, we do not find it to be an impediment to our review in this case.

record supports the trial court's determination, after weighing the evidence, the jury should have reached a different verdict. [Citation.]" (*Galindo* v. *Partenreederei M.S. Parma* (1974) 43 Cal.App.3d 294, 302; see also *Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 933.) This procedure provides a constitutionally adequate trial court review.

As we have noted, Fredricks and Dunn received as much review as they requested: whether *any* punitive damages were merited. Because the trial court granted Pacific Lighting's motion for a new trial as to liability, we cannot say from the record that the trial judge evaluated the propriety or amount of the punitive damages awarded against it. However, the trial judge is now deceased and upon a remand, another judge would be required to hear the matter, out of necessity and by statutory authority. (Code Civ. Proc., § 661; *Telefilm, Inc.* v. *Superior Court* (1949) 33 Cal.2d 289.) Any insight gained from the trial judge's presence at the trial has been lost.

This court is in as good a position as any newly assigned trial judge to evaluate the propriety of the punitive damages awarded. If there had been a court trial, we would have the power to make findings in addition to any made in the trial court. (Code Civ. Proc., § 909.) Although this was a jury trial, the same power exists as it relates to a trial court's independent review of a punitive damages award. An appellate court's "power '. . . to affirm, modify or direct the entry of a final judgment . . . [is] to be liberally construed to the end that a cause may be disposed of on a single appeal.' [Citations.] Where the result, were we to remand, is foreordained from the record, we should exercise this power to dispose of the case without further proceedings." (*Harlow* v. *Carleson* (1976) 16 Cal.3d 731, 738-739 [appellate court reviewed trial issue as if trial court had applied proper standard]; see also *Estate of Friedman* (1979) 100 Cal.App.3d 810, 819 [appellate court made finding omitted by trial court]; compare *In re Mar-*

*riage of Davis* (1983) 141 Cal.App.3d 71, 75-76 [court declined to make omitted finding where evidence was in conflict].) We opt to exercise that power here, and apply the same standard as the trial court in reviewing the award against Pacific Lighting.

Pacific Lighting, Fredricks and Dunn complain that California appellate review is not sufficiently independent and thorough. First, as we have noted, *Haslip* does not mandate an *independent determination* by the appellate court; it merely requires an objective and meaningful *review* of the jury's determination. (*Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. at pp. ___ , ___ [113 L.Ed.2d at pp. 21-22].) Second, we have opted to use the trial court standard of review as to Pacific Lighting.

Fredricks and Dunn suggest California's appellate review system is constitutionally inadequate because the Alabama scheme provides for a comparison with other verdicts in determining the reasonableness of a punitive damages award, and California does not. (See *Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12; *Bigboy* v. *County of San Diego* (1984) 154 Cal.App.3d 397, 406; *Grimshaw* v. *Ford Motor Co.* (1981) 119 Cal.App.3d 757, 818-819.) Of those three cases, only *Grimshaw* dealt with punitive damages. It cited *Bertero* and *Leming* v. *Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 355-356, another case involving compensatory damages. (*Grimshaw* v. *Ford Motor Co.*, *supra*, 119 Cal.App.3d at p. 819.)

While the rule may have great merit when dealing with compensatory damages, we disagree with the *Grimshaw* court that it should be applied to appellate review of punitive damages. Although not necessarily constitutionally mandated, a comparison of punitive to compensatory damages ratios and percentages of net worth helps ensure an award is reasonable within the context of all awards. As the Supreme Court noted in *Adams* v. *Murakami*, *supra*, 54 Cal. 3d 105, "Deciding in the abstract whether an award

is 'excessive' is like deciding whether it is 'bigger,' without asking 'Bigger than what?'" (*Id.* at p. 110.) The court engaged in an extensive and enlightening comparative review of prior awards in *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 393-396. California law permits such a review and we shall make use of it.

The first factor to be considered is whether the amount of the award reasonably reflects the reprehensibility of the defendants' conduct. (*Neal* v. *Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928.) The gist of MGW's causes of action was that the defendants *conspired* to defraud it out of a $500,000 commission. Despite the defendants' attempts to reargue the case,[13] the jury agreed with MGW's theory of the case and found that this was more than a simple misunderstanding or breach of contract.[14] Before reaching this conclusion the jury was instructed that: (1) there was no cause of action for breach of contract or related claims, only for intentional interference with a prospective economic advantage, and conspiracy; (2) to find the former cause of action, the defendants must have acted with a design to disrupt MGW's prospective economic advantage; (3) the jury could not find conspiracy unless it found interference with a prospective economic advantage; and (4) to find conspiracy, the defendants must have agreed to interfere with MGW's prospective economic advantage. Substantial evidence supports the jury's findings on these issues, and we would reach the same result independently.

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[13] Pacific Lighting goes so far as to attempt to relitigate whether Jim Hunter was one of its managing agents, a fact necessary to the imposition of punitive damages. That issue was adversely determined by the jury and we uphold it in the unpublished portion of this opinion. Were we to redetermine the issue sitting as a trial court on a motion for new trial, we would reach the same result.

[14] The jury found in a special verdict that Pacific Lighting and Dunn intentionally interfered with MGW's prospective economic relationship and all defendants conspired with each other to do so.

Given the defendants' conduct, the award reasonably reflects its reprehensibility. Interference with prospective economic advantage is so repugnant to the public interest that the Supreme Court has seen fit to recognize the existence of the cause of action even in the absence of a written agreement. (*Buckaloo* v. *Johnson*, *supra*, 14 Cal.3d at pp. 829-830.) The wrong is compounded when it is perpetrated by fraud. MGW's theory was that the defendants decided to falsely claim that Dunn had previously known about the Rancho Carmel property so that MGW would not be entitled to its finder's fee.

The fraud was all the worse because it was the product of a conspiracy. Although the cause of action for civil conspiracy exists primarily to determine joint liability and is not actionable absent commission of the underlying tort (*Doctors' Co.* v. *Superior Court* (1989) 49 Cal.3d 39, 44), the existence of a conspiracy to perpetrate a civil wrong signals significantly more reprehensible behavior, just as it does in criminal cases. (*Callahan* v. *United States* (1961) 364 U.S. 587, 593-594.) In terms of reprehensibility, this is not a close case.[15]

The next inquiry is whether the punitive damages bear a reasonable relationship to the actual damages. (*Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928.) Here, the ratio was 3.4 to 1 ($2 million to $588,000), below the 4 to 1 ratio the *Haslip* court found *might be* "close to the line." (*Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, 499 U.S. at p. ___ [113 L.Ed.2d at p. 23].)[16] By equally dividing the compensatory damages award among the four defendants against whom they were assessed, the

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[15] The varying awards of punitive damages against the defendants ($800,000 against Pacific Lighting and Dunn, $400,000 against Fredricks, and zero against PREP) demonstrate that the jury made a sincere attempt to apportion fault.

[16] The ratio drops to 2.6 to 1 if pretrial interest is included in the compensatory damages amount ($2 million to $773,200).

defendants calculate the following ratios: 5.44 to 1 as to Pacific Lighting and Dunn ($800,000 to $147,000), and 2.72 to 1 ($400,000 to $147,000) as to Fredricks. This approach ignores the fact that each defendant is jointly and severally liable for the entire compensatory damages award. However, because it does not affect the outcome, we will indulge the defendants' assumption.

Relying on the "close to the line" comment in *Haslip*, Pacific Lighting and Dunn argue that the 5.44 to 1 ratio violates due process as a matter of law. This argument ignores the Supreme Court's refusal in *Haslip* to "draw a mathematical bright line." (*Id.* at p. ___ [113 L.Ed.2d at p. 20].) It also ignores several salient facts. The Supreme Court pointed out that the actual compensatory damages in *Haslip* were unknown; the court assumed the plaintiff got all she asked for. The punitive damages were over 200 times the plaintiff's out-of-pocket expenses. (*Id.* at p. ___ , fn. 2 [113 L.Ed.2d at p. 12].) The Supreme Court has refused to review one post-*Haslip* case involving a ratio of 750 to 1. (*Principal Financial Group* v. *Thomas* (Ala. 1991) 585 So.2d 816, cert. den. 112 S.Ct. 649.)

The punitive damages ratio here falls well within that approved in numerous California cases. (See *Devlin* v. *Kearny Mesa AMC Jeep/Renault, Inc., supra*, 155 Cal.App.3d at pp. 393-396.) Given the conduct involved, even a ratio of 5.44 to 1 was eminently reasonable, not to mention the 2.72 ratio as to Dunn.[17]

The final factor to be considered is whether the award will have a deterrent effect without crippling the financial existence of the defendant. (*Neal* v. *Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928.) Logic suggests this issue cannot be reviewed without some evidence of a defendant's financial condition and *Adams* v. *Murakami*,

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[17] We would reach the same result, whether sitting as an appellate court or a trial court on a motion for new trial.

*supra*, 54 Cal.3d 105 mandated the evidence be placed before the trier of fact.[18] There was adequate evidence for that purpose here. The jury was given Pacific Lighting financial documents, which stated they were for "Pacific Lighting Corporation and subsidiary companies." It also had information that Fredricks and Dunn had recently guaranteed a $27 million payment and assumed additional debt of $13 million.

The court found the award reasonable, expressly noting, "I think that if Dunn and Fredricks were in such strong financial position to guarantee a single cash payment of $27,000,000, and at the same time and in the same transaction assumed an additional debt of $13,000,000, . . . the jury was justified in concluding that an award of $800,000 in one case and $400,000 in the other as punitive damages was justified and reasonable. . . . [¶] Had . . . that financial statement not come into evidence I would have no trouble whatsoever in upholding the award of punitive damages against Dunn and Fredricks."

Although the court's statements were made in response to the argument that Pacific Lighting's financial records prejudiced Fredricks and Dunn, they were clear, concise, and directed specifically to the issue of the propriety of the punitive damages award. Likewise, the evidence was sufficient to show the award will have a deterrent but not crippling effect. Particularly compelling is the evidence that Dunn and Fredricks were guarantors for a $27 million loan. Only multi-million dollar entities would be accepted to act as such by any responsible lender.

Although individual financial statements would have been ideal they were not required. The Supreme Court in *Ad-*

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[18] Interestingly, Fredricks and Dunn initially suggested that the California system was constitutionally inadequate because it allows juries to consider the defendant's wealth, as was the case here. Since the decision in *Adams*, they argue the case should be reversed because no evidence of wealth was presented.

*ams* v. *Murakami, supra*, 54 Cal.3d 105 expressly declined to specify what type of evidence was appropriate to show "defendant's ability to pay." (*Id.* at p. 116, fn. 7.) And, in *Douglas* v. *Ostermeier* (1991) 1 Cal.App.4th 729 the court upheld a punitive damages award where the evidence of the defendant's financial condition consisted of the value of the property involved in the action and the values of some of the defendant's other property. (*Id.* at p. 749.)

All that is necessary in cases where punitive damages are awarded is some evidence from which a reasonable jury and reviewing courts can conclude the award will deter but not cripple the defendant financially. That standard was met here.

Even if the evidence here were insufficient, Fredricks and Dunn would not be entitled to a reversal. They waived this particular aspect of the punitive damages issue, not because they failed to raise the point below (see *Adams* v. *Murakami, supra*, 54 Cal.3d at p. 115, fn. 5), but because they affirmatively objected to further evidence of their financial condition. (*Kessler* v. *Gray* (1978) 77 Cal.App.3d 284, 290 [appellant may not object to sufficiency of evidence when it arises from exclusion of evidence at appellant's instance].)[19]

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[19] *George* v. *International Society for Krishna Consciousness of California, supra*, 3 Cal.App.4th 52 is distinguishable. There, the defendants apparently first objected but then complied with attempts to obtain information about their finances. The plaintiffs opted not to submit evidence of the defendants' worth. The court concluded, "[R]esponsibility for the lack of financial evidence cannot fairly be attributed solely or even principally to defendants." (*Id.* at p. 123.)

Here, MGW sought financial evidence but the defendants resisted. However, they eventually agreed that MGW could use the Pacific Lighting financial records. The only comment voiced about those records was defense counsel's continuing contention that the evidence was insufficient to allow the question of punitive damages to go to the jury *as to Pacific Lighting*. Based on that conduct, Dunn and Fredricks are estopped to claim the financial condition evidence was insufficient as to them.

There was much more precise evidence of Pacific Lighting's financial condition. Its financial statement showed it was a huge multi-billion dollar corporation. Its net income for 1983 was over $157 million. Its net worth (subtracting long term debt from total assets) was $2.46 billion. Given those figures, the punitive damages award was about one-half of one percent of Pacific Lighting's net income for 1983, and three one-hundredths percent of its net worth. Put in perspective, it was the equivalent of a $250 award against a person with net annual income of $50,000, or a $195 award against someone with a net worth of $600,000.

As we have noted, the trial court granted Pacific Lighting a new trial on the issue of liability. Therefore, it did not determine whether the award would deter Pacific Lighting without crippling it. However, based on the figures presented, we independently determine that the standard was met.

The judgment is reversed as it relates to the granting of Pacific Lighting's motions for new trial and for judgment notwithstanding the verdict, and remanded to the trial court for the purpose of entering judgment for MGW. In all other respects the judgment is affirmed.[20] MGW is entitled to recover costs from Fredricks, Dunn, PREP, and

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[20] Fredricks and Dunn argue in a footnote that the award of prejudgment interest was invalid, citing *Gourley* v. *State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121. They waived the issue by failing to object in the trial court. (*Wiley* v. *Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 188.) In any event, interest was awarded pursuant to Civil Code section 3288 (providing for an interest award at the jury's discretion in cases of oppression, fraud, or malice), not pursuant to Civil Code section 3291 which was the subject in *Gourley* v. *State Farm Mut. Auto. Ins. Co.*, *supra*, 53 Cal.3d 121.

Pacific; Home and Humboldt are entitled to recover costs from MGW.

WALLIN, J.

WE CONCUR:

SILLS, P. J.

SONENSHINE, J.

## APPENDIX D

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## No. 90-626

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PACIFIC LIGHTING CORPORATION, et al.,
Petitioners,

v.

MGW, Inc.

March 18, 1991. On petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Fourth Appellate District, for further consideration in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ___ (1991).

**APPENDIX E –**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK**

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**No. S015966**

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MGW, INC.,

Appellant

v.

FREDERICKS DEVELOPMENT CORP. et al.,

Appellants

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**[Filed December 2, 1992]**

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No further briefs by the parties or amici curiae shall be accepted for filing until further order of this court. This order supersedes all prior orders regarding briefing time, including the order filed November 25, 1992. The court anticipates that the order for further briefing shall not be filed until after the United States Supreme Court files its opinion in TXO Production Corp. v. Alliance Resources Corp., Docket No. 92-479, certiorari granted November 30, 1992.

/s/ Lucas
Chief Justice

Supreme Court, U.S.
FILED
OCT 15 1993
OFFICE OF THE CLERK

No. 93-426

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1993

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PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

*Petitioners,*

v.

MGW, INC.,

*Respondent.*

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**Opposition To Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District**

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# OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of this Court, MGW, Inc. does not have any parent companies or non-wholly owned subsidiaries.

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No. 93-426

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1993

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PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

*Petitioners,*

v.

MGW, INC.,

*Respondent.*

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**Opposition To Petition For Writ Of Certiorari**
**To The Court Of Appeal Of California,**
**Fourth Appellate District**

---

# OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I. INTRODUCTION.

This lawsuit is a month shy of its tenth birthday. Petitioners want to ensure that it reaches its teenage years. They urge this Court to start the California appellate process all over again. Petitioners do not even believe that the case is worthy of review by this Court; instead, they seek only a remand for yet a third journey through the California appellate system. They advise this Court that it must send a message to the California Supreme Court that due process attacks on punitive awards are not dead; but courts are not in the business of sending messages, but of deciding cases.

Petitioners give the merits of *this case* short shrift, no doubt because even they know the *merits* of this case are unworthy of review by this Court. This case was tried to a jury that found, by clear and convincing evidence, that petitioners had committed fraud and malice. They found that awards totalling 2.6 times the gain obtained by petitioners would be a fair amount to punish and deter. The highest award, $800,000, was only slightly greater than the $773,200 in actual damages. The jury was instructed, *at petitioners' insistence*, that they could consider wealth. This instruction is now petitioners' main complaint.

Two of the petitioners, Dunn and Fredricks, did not even bother to ask the trial judge to reduce the awards, and thereby waived the right to attack them as excessive. The California Court of Appeal *independently* examined the record and concluded that the award against Pacific Lighting was justified. At this point, *twelve jurors* and *three appellate court judges* have *independently* concluded that petitioners' conduct was "reprehensible", and the amounts awarded were proper. In fact, their main complaint is that the instruction that *they, not MGW,* proposed, told the jury that they could consider wealth in assessing punitive damages.

What is worse, petitioners fail to discuss the procedural problems with this case at all. For example, they act as though the California Supreme Court's dismissal of this case came out of the blue after this Court's decision in *TXO* came down. Ignored is the fact that a motion to dismiss for failure to preserve issues was pending before the California Supreme Court and had been fully argued, with the last briefs submitted only days prior to the dismissal.[1] They also ignore that the Court of Appeal had earlier found against them because of many of the same procedural shortcomings.

The California courts have *already* correctly decided this case in light of *Haslip* and *TXO*. There is no reason for this Court to order them to do it again.

## II. SUMMARY OF PROCEEDINGS.

This case was tried to a jury which rendered a verdict in favor of MGW, Inc., against petitioners Dunn Properties Corporation, Fredricks Development Corporation, and Pacific Lighting. The jury awarded actual damages of $773,200 (inclusive of pre-trial interest) and punitive damages of $800,000 each against Dunn and Pacific Lighting, and $400,000 against Fredricks.

On motion for a new trial and judgment notwithstanding the verdict, the award against Pacific Lighting was vacated on grounds no longer relevant. The awards against Dunn and Fredricks were not disturbed.

The Court of Appeal affirmed as to Dunn and Fredricks, and reinstated the judgment against Pacific Lighting. The California Supreme Court declined to review that opinion. The

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[1] Issues of California law, as well as federal issues, were before the Court. Dismissal of these state law issues can only be explained on procedural grounds, since *TXO*, obviously, in no way controls them.

defendants then petitioned for *certiorari* on the punitive damage award only. This Court held this and other punitive damage cases pending its ruling in *Pacific Mut. Life Ins. Co. v. Haslip*. After affirming *Haslip*[2], this Court remanded all of those cases (except for two that arose in Alabama) back to the states for further proceedings in light of *Haslip*.

On remand, petitioners requested, and were granted, further briefing and oral argument. Ultimately, the Court of Appeal rejected the Federal Due Process challenge and reinstated its prior judgment. In so doing, it applied factors very similar to the *Green Oil* factors approved by this Court in *Haslip*, noting in particular that "in terms of reprehensibility, this is not a close case." pp. 30–1.

The Court of Appeal also found that California's standard of *trial court* review was "virtually independent"[3] and met any requirement of *Haslip*. The Court went on to hold that something less than independent *appellate* review was the standard in California, but found this constitutionally sufficient. Nonetheless, Pacific Lighting was accorded the same "virtually

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[2] *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1.

[3] The Court stated:

> Even so, in California the trial court's determination is virtually independent. "In considering a motion for new trial, the trial judge is entitled to reweigh the evidence, consider the credibility of the witnesses and draw reasonable inferences contrary to those accepted by the jury. [Citation.] The question is not whether there is substantial evidence to support the jury's verdict but whether the record supports the trial court's determination, after weighing the evidence, the jury should have reached a different verdict. [Citation.]" p. 24a–25a of Appendix of Petitioners.

independent" review afforded by the trial judge. Many of the claimed violations of due process were dismissed since they were not properly preserved. Specifically, Dunn and Fredricks' excessiveness claim was rejected since not made in the trial court.[4] The Court undertook a comparison of this award to awards in other cases in light of the factors underlying the imposition of punitive damages.[5] The Court concluded that there was nothing excessive about the award.[6]

The California Supreme Court then granted review. Petitioners sought to present the same argument concerning wealth as they ask this Court to consider.[7] While review was pending, this Court granted *certiorari* in *TXO Production Corp. v. Alliance Resources Corp.* (1992) 419 S.E.2d 870, and the California Supreme Court stayed further briefing pending

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[4] "We presume that had Fredricks and Dunn asked the trial court to review whether the damages were *excessive*, the court would have done so." p. 23a of the Appendix of Petitioners.

"As we have noted, Fredricks and Dunn received as much review as they requested: whether *any* punitive damages were merited." p. 25a of the Appendix of Petitioners.

[5] "Although not necessarily constitutionally mandated, a comparison of punitive to compensatory damages ratios and percentages of net worth helps ensure an award is reasonable within the context of all awards." p. 26a of Appendix of Petitioners.

[6] "Here, the ratio was 3.4 to 1 ($2 million to $588,000), below the 4 to 1 ratio the *Haslip* court found *might* be 'close to the line.'" p. 28a of Appendix of Petitioners. "The ratio drops to 2.6 to 1 if pretrial interest is included in the compensatory damages amount ($2 million to $773,200)." *Id.* at fn. 16.

[7] In the case of Dunn and Fredricks, this was a total flip-flop. Previously, they had argued that the judgment against them should be reversed since there was no evidence of their wealth.

resolution of that case. App. 35a of Appendix of Petitioners. MGW moved the Court to dismiss the appeal as improvidently granted for various procedural deficiencies that would preclude relief even apart from the substantive due process contentions.[8] As the first item on the motion, MGW asserted dismissal was warranted because, "1. Defendants proposed the punitive damage instruction which they now condemn."

After the Court took the motion under submission, but before decision, this Court's opinion in *TXO*[9] was filed. The parties then filed additional briefs on the motion to dismiss, discussing the effect of this Court's *TXO* decision at length. MGW pointed out that this Court's decision in *TXO* provided additional support for its position. Petitioners filed opposition, controverting MGW's position, and discussing *TXO* in detail.[10]

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[8] A copy of the motion is attached to the Appendix to this brief.

[9] *TXO Production Corp. v. Alliance Resources Corp.* (1993) ___ U.S. ___., 113 S.Ct. 2711.

[10] Pacific Lighting, nine days before the California Supreme Court dismissed review, filed a brief which discussed in detail *TXO* and argued that this case should not be dismissed:

> MGW asserts in its supplemental brief in support of its motion to dismiss that the United States Supreme Court's June 25, 1993 decision in *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479 (copy attached), "disposes" of these issues. That assertion is flatly incorrect, and MGW's motion to dismiss should be denied...Nothing in *TXO* obviates the pressing need for this Court to resolve that exceedingly important question. Moreover, MGW's "waiver" argument in support of dismissal is utterly without merit... *Pacific Lighting Corporation's Response to MGW, Inc.' Supplemental Brief in Support of Motion to Dismiss as Improvidently*

The California Supreme Court then unanimously granted the motion. The instant petition for *certiorari* was then filed.

## III. STATEMENT OF FACTS.

The underlying facts of this case are discussed at length in the Court of Appeal opinion and need not be repeated here given the issues under review. In essence, Fredricks agreed to pay MGW a finder's fee if MGW found it an investment opportunity.[11] MGW brought the Rancho Carmel project to Fredricks' attention, and Fredricks, along with Dunn, a related corporation, entered into a joint venture with Home Capital on the property. Dunn and Pacific Lighting induced Fredricks to renege on paying MGW a finder's fee by concocting a story to the effect that they had not learned of the Rancho Carmel

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*Granted*, pp. 1, 8.

[11] Petitioners' side-argument that the award is excessive because MGW should not recover for entering into an unenforceable oral commission agreement is really nothing more than an attack on the settled law of California in this regard. *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, and its progeny establish that it is the policy of California to discourage persons from committing interference, whether or not the relationship had ripened into a binding contract. In fact, this represents the majority rule:

> A promise may be a valid and subsisting contract even though it is voidable... Thus, *by reason of the statute of frauds*, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms, the third person may be in a position to avoid liability for any breach. The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided. Restatement of Torts, Second, Section 766, comment f.

opportunity through MGW, when they clearly had. Dunn, Fredricks, and Pacific Lighting operated through their senior management, including the presidents of Dunn and Fredricks. Their story, had it been successful, would have saved them over half a million dollars. As the Court of Appeal noted, their conduct throughout was fraudulent and in bad faith.

## IV. PETITIONERS' "SEND A MESSAGE" ARGUMENT IS UNSOUND.

### A. Since the California Supreme Court has already considered *TXO*, remand for further consideration in light of *TXO* makes no sense.

The first reason petitioners assert for remanding this case is that the California Supreme Court misperceived this Court's intent when it decided *TXO*. In their view, this Court, by its affirmance of the award in *Haslip*, gave strict marching orders to the state courts to get their houses in order. Despite this, their argument continues, both the California Court of Appeal and Supreme Court do not seem to have gotten the message. This Court must, by remanding here, impress upon those courts that they have mistakenly construed *Haslip* and *TXO*.

The trouble with this reasoning is that the California courts have already decided this case the way they have because, *having considered Haslip* and *TXO*, they felt the result here was correct. It is simply speculation that the California Supreme Court misconstrued *TXO*. Petitioners have no right to a remand on the bald assertion that the California courts misunderstood this Court's intent. (If this Court were to remand, and the California courts again affirmed the awards, would yet another remand be in order?) And totally ignored in this discussion is the central issue here, whether *this* case was wrongly decided. On this point, petitioners have virtually nothing to say.

### B. The Court of Appeal opinion already fulfills any requirements that *TXO* might impose.

The Court of Appeal analyzed the facts of this case in the same fashion as did the plurality in *TXO*:

| *TXO* | *MGW* |
|---|---|
| The punitive damages in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow. | ...the jury agreed with MGW's theory of the case and found that this was more than a simple misunderstanding or breach of contract...MGW's theory was that the defendants decided to falsely claim that Dunn had previously known about the Rancho Carmel property so that MGW would not be entitled to its finder's fee. The fraud was all the worse because it was the product of a conspiracy....*In terms of reprehensibility, this is not a close case....*<br><br>The punitive damages ratio here falls well within that approved in numerous California cases. |

These findings meet the requirements of *TXO*. Just one factor, the need to take the profit out of petitioners' wrongful conduct, provides ample support for the sums awarded. If the worst that can happen to a thief is that he has to give the stolen goods back, then thievery makes good economic sense.

Compensatory damages in this case did nothing except force petitioners to disgorge their ill-gotten gains. If that is their downside risk, then they have a green light to repeat the same conduct. Is it really more likely that the jury here was bent on redistributing wealth than on inflicting a penalty on petitioners (2.6 times the ill-gotten gains) sufficient to keep them from doing it again?

### C. Denials of *certiorari* by this Court indicate that no "misperception" has occurred.

While making much over this Court's remand of *Hanson v. American Nat'l Trust Co.* (1993) 113 S.Ct. 3029, in the closing days of last term, petitioners ignore the uniform denial of *certiorari* in punitive damage cases.[12] Of particular note is the denial in *Shell Oil Co. v. Nelson*, docket no. 93-84, a California case.

## V. THE "WEALTH INSTRUCTION" DOES NOT SUPPORT REMAND.

The second reason petitioners cite as requiring remand is that, in their view, this case squarely presents the issue of the wealth instruction that the *TXO* plurality refused to reach. Petitioners ignore that:

-- *they, not MGW,* requested the instruction telling the jury to consider wealth;

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[12] *Reserve Nat. Ins.' .Co. v. Crowell*, docket no. 92-1978, *Hillcrest Mecial Center v. Scribner*, docket no. 92-1982, *Swarovski Int'l. v. Ebeling & Reuss*, docket no. 92-2041, *Shell Oil Co. v. Nelson*, docket no. 93-84, *Owens-Illinois, Inc. v. Pool*, docket no. 92-1241, *Nickerson American Plant Breeders, Inc. v. Latham Seed Co.*, docket no. 92-1376, *Celotex Corporation v. Pool*, docket no. 92-1471, *Farmers Ins. Group v. Massey*, docket no. 92-1570, *National States Ins. Co. v. Nassen*, docket no. 92-1378.

-- Dunn and Fredricks successfully kept out evidence of their financial condition, only to then later argue that wealth was a necessary prerequisite for an award of punitive damages;[13]

-- the award, amounting to 2.6 times actual damages, does not reflect a runaway jury enraptured by how rich the defendants were;

-- the aggravating factors that made *TXO* at all a close case are absent here;[14]

-- California procedure afforded petitioners the right to bifurcate the issue of punitive damages, with evidence of wealth not allowed in the first, non-punitive, phase;[15]

-- the jury awarded the same amount, $800,000, against Pacific Lighting, by far the wealthiest of the defendants, as it did against Dunn, awarded less, $400,000, against Fredricks, and nothing against a fourth co-conspirator, Pacific Real Estate Project, Inc. These awards belie that wealth was a controlling factor in determining the appropriate punishment.

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[13] See Opinion of the Court of Appeal, p. 30a of Appendix of Petitioners, n. 18. And in the California Supreme Court they argued "...there was no evidence in the record as to the wealth of Fredricks and Dunn". *Appellants' Opening Brief*, p. 19.

[14] There were no references to defendants being out of state (since they weren't) nor to their corporate identity (perhaps because plaintiff was a corporation as well, and the court instructed that the defendants' corporate capacity could not be taken into account).

[15] Civil Code Section 3295 requires bifurcation of the amount of punitive damages on the request of any defendant. Only after the jury finds the factual prerequisites for punitive damages does the defendant's wealth become an issue.

### A. Failure to have objected in the trial court precludes consideration by this Court.

Petitioners contend that because the Court of Appeal considered their wealth argument, it is now properly before this Court. They ignore *City of Springfield, Mass. v. Kibbe* (1987) 480 U.S. 257. There, as here, the petitioner had requested the jury instruction. Nonetheless, the Court of Appeals had addressed the instruction. This Court, applying the doctrine of invited error, refused to do so:

> The Dissent argues that we need not concern ourselves about Springfield's failure to preserve this issue, because it was passed on by the Court of Appeals below. Dissent, at 1118–9. There is doubtless no jurisdictional bar to our reaching it, whether or not the Court of Appeals did so. [Citation.] We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that the petitioner accepted, and indeed itself requested. *Id.* at 1116.[16]

Under California procedure, a party may not challenge a jury instruction that he proposed, even where it is contrary to law. *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117. *See also, Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81, 82; *Mercer v. Theriot* (1964) 377 U.S. 152, 154; *United States v. Atkinson* (1936) 297 U.S. 157, 159.

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[16] In fact, under the authority of *Kibbe*, the Seventh Circuit has rejected a challenge to a punitive damage instruction for failure to have objected at trial. *Williamson v. Handy Burron Mach. Co.* (7th Cir. 1987) 817 F.2d 1290, 1295. *See also, Mairena v. Foti* (5th Cir. 1987) 816 F.2d 1061, 1064, fn. 2.

These cases all recognize the fundamental injustice of allowing a party to obtain a reversal based upon an error made *at his request*.

**B. There is no basis for reconsideration.**

Petitioners seek a remand to the Court of Appeal for "reconsideration" of its ruling that the wealth instruction was constitutional in light of *TXO*. To the extent that *TXO* does shed light on this issue, the California courts' analysis of this case is consistent with that light. Three justices in dissent in *TXO* expressly found wealth an appropriate consideration:

> This is not to say that consideration of a defendant's wealth is unconstitutional.... As a historical matter, the wealth of the perpetrator long has been thought relevant....Moreover, Haslip itself suggests that the defendant's wealth is a permissible consideration, ante, at 17–18, n. 28, 19 (plurality opinion), although it does so only in the context of appellate review. See, 499 U.S., at 22. (O'Connor, dissenting)

While this quotation is from the dissent, combined with the views of Justices Scalia and Thomas, there are *at least* five[17] justices who view wealth as an appropriate consideration. [18] [19] Nor is there anything in Justice

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[17] *See also, Browning-Ferris Industries v. Kelco* (1989) 492 U.S. 257, 109 S.Ct. 2909, O'Connor, dissenting. In that case, Justice Stevens joined with Justice O'Connor in finding wealth an appropriate consideration, indicating that at least six justices believe wealth an appropriate consideration.

[18] The Court has also recognized on previous occasions that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded", *City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 270,

Kennedy's concurrence that indicates wealth may not be considered.[20] The plurality decision in *TXO* did not decide

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[noting that the *Restatement* rule allows such evidence]. The *Restatement of Torts, Second*, Section 908(2) states: "The trier of fact can properly consider...the wealth of the defendant."

[19] That is not to say that, in a particular case, the over-emphasis placed upon wealth could not create an arguable issue. But the instruction here, which informed the jury that wealth is a relevant consideration, is not therefore constitutionally suspect. If a jury is entitled to take wealth into account (as it is), the issue is: Has the jury followed its instructions (taking wealth into account only as a factor to determine the appropriate level of punishment), or has it instead acted based on a prejudice against a wealthy defendant or a desire to redistribute wealth? That some juries do not follow instructions is not a reason to throw out the baby with the bath water.

[20] In Justice Kennedy's view, the proper inquiry is whether the record demonstrates that the jury acted out of improper motives such as bias or prejudice. In *TXO*, in his view, the record showed that the jury was motivated by the malice of TXO rather than inappropriate preoccupation with its wealth:

> There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent."

anything at all concerning the wealth instruction, specifically refusing to reach the issue. Thus, if this Court remanded the case for reconsideration "in light of *TXO*", the obvious next question is, In light of what? In light of the plurality's refusal to reach the issue? There is simply no reason to remand this case "in light of TXO".

### C. Other California procedures assured that the defendants' due process rights were protected.

Examining California procedures at the three stages analyzed in *Haslip* confirms that petitioners' interests were protected far beyond what due process requires:

*Jury Instruction.*

The California jury is told specific factors to apply, similar to the *Green Oil* factors that Alabama applies on review; by contrast, the jury in *Haslip* was told simply to punish and deter.

The California defendant, unlike Pacific Mutual, enjoys a "clear and convincing" standard.[21]

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[Citation.] (Kennedy, J., concurring)

The same considerations apply here. The conduct of the defendants was found by the Court of Appeal to be "reprehensible". As in *TXO*, the conduct here was not of some renegade low-level employees, but of corporate officers of the highest rank. In fact, under California law, only the conduct of high ranking corporate employees can form the basis for a punitive award. Civil Code Section 3294(b).

[21] In addition, under California law, a defendant can be punished only for a wrong he has committed or approved, Civil Code Section 3294(b); an innocent Alabama defendant can be punished for what his employees did.

Unlike California, the jury in Alabama is not told to segregate the amount of punitive damages; in California, they must be segregated.

In addition, in California, the defendant is entitled upon request to a bifurcated trial, with evidence of his finances kept from the jury until it has first found the requisite facts to award punitive damages. Civil Code section 3295(d).[22]

*Post-trial Review.*

Petitioners Dunn and Fredricks did not request that the trial judge determine whether the award against them was excessive, apparently because they did not believe they had a prayer of winning on the issue. The Court of Appeal held that this failure constituted a waiver. The Court of Appeal also noted that, in light of comments of the trial judge on other issues, he would not have been inclined to reduce the award had he been asked to do so.

Since Pacific Lighting obtained judgment notwithstanding the verdict, the trial judge did not pass on the excessiveness of the award as to it. By the time the Court of Appeals reinstated the verdict against Pacific Lighting, the trial judge had died. Therefore, the appellate court, as is authorized under California law, conducted the review of the award normally undertaken by the trial judge. In so doing, it applied the normal California post-trial standard, which it termed as "virtually independent".[23] It concluded that, in its independent

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[22] In this case, the trial was not bifurcated since defendants, for reasons known only to themselves, did not request bifurcation.

[23] The Court relied upon *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 933, which states that the trial judge sits as an "independent trier of fact" and is authorized to reduce the punitive damage award by "so much [of the verdict] as the court *in its independent judgment determines from the evidence to be fair and*

judgment, the verdict against petitioners should stand.

*Appellate Review.*

Even assuming that appellate review is required, a dubious assumption at best[24], nothing approaching "independent" appellate review is required. The jury award in *Haslip* was, after all, "presumed correct" by both the Alabama

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*reasonable."* [Emphasis in original.] Because in *Neal* the evidence on the point was "*in substantial conflict*", *id.* [emphasis added], the Court *upheld the trial judge's remittitur*.

[24] Due process does not require appellate review at all. *Evitts v. Lucey* (1985) 469 U.S. 387, 393; *Ross v. Moffitt* (1974) 417 U.S. 600, 606; *Griffin v. People of the State of Illinois* (1956) 351 U.S. 12, 18, *Dist. of Columbia v. Clawans* (1937) 300 U.S. 617, 627; *Reetz v. Michigan* (1903) 188 U.S. 505, 508; *McKane v. Durston* (1894) 153 U.S. 684, 687. True, the protections available through appellate review may save an otherwise defective system. But an otherwise adequate system does not become defective even if there is no right to appeal at all. *See, e.g., Ohio v. Akron Park District* (1930) 281 U.S. 74, 80 ["the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."]

trial judge and the Alabama Supreme Court.[25]

## VI. THE PROCEDURAL DEFECTS IN THIS CASE PRECLUDE RELIEF.

Petitioners are required to preserve issues that they wish to appeal. The California Court of Appeal and Supreme Court both found that petitioners failed to do so. These defects prevent review here since they constitute adequate and independent state procedural grounds.

In this case,

1. Defendants proposed the punitive damage instruction which they now condemn. RT 1639/3–18.

2. At no time was a federal issue raised by *anybody* at trial.

3. Defendants did not request that the trial judge reduce the punitive damage award.

4. Defendants Dunn and Fredricks never raised a federal issue on the first appeal.

---

[25] In fact, the California *appellate standard* is virtually identical with the Alabama *trial judge standard*:

*Hammond* (Alabama)

We do emphasize, however, that only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption or other improper motive may a *trial court* order a new trial or remittitur. Id. at 1379. [Emphasis added.]

*Neal* (California)

[W]e indicated that an appellate court may reverse such an award "only `when the award as a matter of law appears excessive, *or* where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice.' *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 927.

5. After Dunn and Fredricks had failed to assert a federal issue in their brief, Pacific Lighting (represented by different counsel on appeal) advanced a due process argument, albeit a different one than it advances now.[26] This argument was rejected summarily.

6. On appeal, none of the defendants sought reduction of the punitive damage award.

7. In their prior petitions for review, none of the defendants sought reduction of the punitive damage award.

8. In their prior petitions for *certiorari*, none of the defendants sought reduction of the punitive damage award.

## VII. CONCLUSION.

The efforts of ten years, twelve jurors, and three justices of the California Court of Appeal (on two occasions) have gone into this case. The decision is unanimous: petitioners' senior management conspired to defraud MGW out of over half a million dollars.

After all this time, the best petitioners can do is argue that the trial judge erred when he went along with their proposed jury instruction. While they may argue that this was error, they cannot argue that it was not invited.

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[26] It argued that the California scheme for assessment of punitive damages violates due process *because it does not set a ceiling* in advance on the amount of punitive damages that can be assessed.

Petitioners have had enough process. A third trip through the California appellate system is uncalled for. *Certiorari* should be denied.

October 14, 1993.

Respectfully submitted,
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# APPENDIX

APPENDIX A

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

---

FOURTH CIVIL NO. G006654
SUPREME COURT NO. S015966

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**MGW, INC.,**
A California Corporation,
dba THE WAITT COMPANY,
*Plaintiff and Respondent,*
vs.
**FREDRICKS DEVELOPMENT CORPORATION, et al.**
*Defendants and Petitioners.*

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Appeal From the Superior Court Of Orange County
Honorable Samuel B. Taylor
Superior Court Case No. 416196

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**MOTION TO DISMISS APPEAL AS**
**IMPROVIDENTLY GRANTED**

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The Court has ordered briefing in this case stayed pending the decision of the United States Supreme Court in TXO Production Corp. v. Alliance Resources Corp., Docket No. 92-479, *certiorari granted* November 30, 1992. While that case may or may not have anything to say that sheds light on the Due Process issues in this case, it certainly will have nothing to say concerning the California state law *procedural* reasons why this appeal must fail. In short, in this case,

1. Defendants proposed the punitive damage instruction which they now condemn.

2. At no time was a federal issue raised by *anybody* at trial.

3. Nor did defendants request that the trial judge reduce the punitive damage award.

4. Defendants Dunn and Fredricks never raised a federal issue on the first appeal.

5. After Dunn and Fredricks had failed to assert a federal issue in their brief, Pacific Lighting (represented by different counsel on appeal) advanced a due process argument, albeit a different one than it advances now.[1] This argument was rejected summarily.

6. On appeal, none of the defendants sought reduction of the punitive damage award.

---

[1] It argued that the California scheme for assessment of punitive damages violates due process *because it does not set a ceiling* in advance on the amount of punitive damages that can be assessed.

7. In their prior petitions for review, none of the defendants sought reduction of the punitive damage award.

8. In their petitions for *certiorari*, none of the defendants sought reduction of the punitive damage award.

9. On remand from the U. S. Supreme Court, for the first time, petitioners argued that the award was excessive on federal, not state, grounds.

The procedural issues which bar relief have been fully briefed by the parties here and in the court below. Any additional argument on the point that appellants may wish to make can be made in reply to this motion. No useful purpose is served by a long wait for the TXO decision if, in fact, the case must be affirmed in any event for procedural reasons.

Accordingly, MGW respectfully requests that the Court consider those issues at this time and dismiss the appeal as improvidently granted.

Dated: March 1, 1993

Respectfully submitted,
PEREZ & McNABB
by JEFFREY ALAN MILLER
*Attorneys For Plaintiff/Respondent.*

Supreme Court, U.S.
FILED
OCT 20 1993
OFFICE OF THE CLERK

No. 93-426

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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PACIFIC LIGHTING CORP., FREDRICKS DEVELOPMENT CORP. and DUNN PROPERTIES CORP.,

*Petitioners,*

v.

MGW, INC.,

*Respondent.*

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**On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District**

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## REPLY MEMORANDUM

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## REPLY MEMORANDUM

Respondent MGW, Inc.'s 19-page brief in opposition to certiorari cannot overcome a simple, unassailable and exceedingly unfortunate fact: the highest court in the Nation's largest State was on the brink of scrutinizing its punitive damage system for constitutional defects when this Court decided *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), but dismissed this case and three others only days after *TXO* as "improvidently granted." Pet. App. 1a. A misconstruction of the meaning of *TXO*, not any state law "procedural shortcomings," Opp. at 2, is the only conceivable explanation for these actions. *See* Petition at 4, 6-7.

Indeed, *all* of the federal due process issues presented by this case were fully argued and expressly decided by the California Court of Appeal. *See* Pet. App. 16a-32a.[1] The Court of Appeal squarely and unequivocally rejected petitioners' argument that California's standardless, wealth-based model jury instruction violated the Due Process Clause as interpreted by this Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), holding that that instruction included sufficiently "objective factors designed to effect the policies behind such awards," Pet. App. 18a, and that it was proper "for the jury to consider the defendants' wealth." Pet. App. 21a. It also upheld as constitutional California's post-verdict review procedures, including its "passion or preju-

[1] The other three punitive damage cases that the California Supreme Court dismissed as improvidently granted after *TXO*, *see* Petition at 4 n.2, raised the identical and other closely related due process issues that had been explicitly decided by the California Court of Appeal.

dice" standard of appellate review. *See, e.g.*, Pet. App. 18a-19a.

Accordingly, it is frivolous for MGW to contend throughout its brief that this Court should deny certiorari "for failure to preserve issues." Opp. at 2, 11, 17.[2] As this Court has repeatedly held, "[t]here can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *see also Cohen* v. *Cowles Media Co.*, 111 S. Ct. 2513 (1991) (same); *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (same); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974) (same). Moreover, MGW's "waiver" arguments are flatly inconsistent with California law as well. *See, e.g., Adams* v. *Murakami*, 54 Cal. 3d 105, 115 n.5 (1991) (rejecting plaintiff's waiver arguments concerning defendant's challenge to proper procedures for imposing punitive damages because "the primary interest that must be protected is the public interest in punitive damages awards in appropriate amounts. We cannot allow the *public* interest to be thwarted by a defendant's oversight or trial tactics.") (emphasis in original).

MGW also argues at length on the merits that the California punitive damage system and the $2,000,000 award that it produced here comport with the Due Process Clause as interpreted in *TXO*. *See, e.g.*, Opp. at 7-10, 12-16. This Court should grant certiorari, vacate the judgment below and remand this case so that the California courts may address that question

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[2] MGW unsuccessfully advanced these exact arguments in opposition to petitioners' first certiorari petition in this case (No. 90-626), which the Court granted. *See* Pet. App. 34a.

in the first instance, and also to make clear that, particularly after *TXO*, the courts continue to bear constitutional responsibility for ensuring that their respective punitive damage regimes include fair procedures that protect against arbitrary and unreasonable punishments.

October 20, 1993

Respectfully submitted,

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